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In the Supreme Court of the United States

OCTOBER TERM, 1958

ST. LOUIS AMUSEMENT COMPANY, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL COMMUNICATIONS COMMISSION IN OPPOSITION

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OPINIONS BELOW

The opinion of the court below (Pet. App. 1a) is not yet reported. The decision and order of the Federal Communications Commission (R. 451–465) has not been reported.

JURISDICTION

The judgment of the Court of Appeals was entered on August 28, 1958. The petition for a writ of certiorari was filed on September 30, 1958. The jurisdiction of this Court rests on 28 U. S. C. 1254 (1) and 47 U. S. C. 402 (j).

QUESTION PRESENTED

Whether a former applicant for a television construction permit, whose application the Commission had denied for non-prosecution and who had not appealed from such denial, has standing to challenge the Commission's subsequent approval of a transfer of the permit by the successful applicant.

STATUTE INVOLVED

The pertinent provisions of the Communications Act of 1934 (48 Stat. 1064, as amended, 47 U. S. C. 151, *et seq.*), in addition to those set forth in the petition, pp. 2–4, are as follows:

> SEC. 402 (b). Appeals may be taken from decisions and orders of the Commission to the United States Court of Appeals for the District of Columbia in any of the following cases:
>
> * * * * *
>
> (6) By any other person who is aggrieved or whose interests are adversely affected by any order of the Commission granting or denying any application described in paragraphs (1), (2), (3), and (4) hereof.
>
> * * * * * *
>
> SEC. 405. After a decision, order, or requirement has been made by the Commission in any proceeding, and party thereto, or any other person aggrieved or whose interests are adversely affected thereby, may petition for rehearing; and it shall be lawful for the Commission, in its discretion, to grant such a rehearing if sufficient reason therefor be made to appear. * * *

STATEMENT

On December 2, 1957, the Commission dismissed for lack of standing petitioner's protest against the Commission's action on October 23, 1957, approving two television channel assignments in St. Louis, Missouri: the transfer of KWK, Inc.'s license for Channel 4 to Columbia Broadcasting System (CBS) and the transfer of CBS's construction permit for Channel 11 to 220 Television, Inc. Petitioner supported its claim of standing to protest on the ground that it was once an applicant for Channel 11 and participated initially in the comparative proceedings which led to the award of the Channel 11 permit to CBS. The pertinent facts with respect to this antecedent proceeding are as follows:

On December 4, 1953, the Commission designated for comparative hearing applications for Channel 11 filed by petitioner, CBS, 220 Television, Inc., St. Louis Telecast, Inc., and Broadcast House, Inc. (R. 6–8). Prior to hearing petitioner moved to dismiss the CBS application on the sole ground that a grant of Channel 11 to CBS would violate a provision of Section 3.636 of the Commission's Rules, as revised subsequent to the filing of the CBS application (18 F. R. 7799–7800), which limited the number of stations in which any one person was permitted to hold an interest (R. 36). The Commission denied petitioner's motion to dismiss on the authority on an earlier Opinion and Order granting a waiver to CBS (R. 11–12, 8–11). Petitioner unsuccessfully sought review in the court of appeals, which dismissed its appeal as premature on

August 11, 1954, and in this Court, which denied certiorari on November 8, 1954 (348 U. S. 876).

At the opening session of the comparative hearing on August 20, 1954, petitioner moved for a postponement pending the filing and disposition of its petition for certiorari (R. 12–23). When the Hearing Examiner denied this motion, counsel for petitioner stated that it would not participate further in the proceeding so long as CBS remained a party (R. 16–23). The Examiner then held petitioner in default (R. 23). On August 23, 1954, petitioner appealed to the Commission from the Examiner's refusal to postpone the hearing, but not from the default ruling (R. 23–24). The Commission ruled adversely to petitioner, and sustained the Examiner, on November 4, 1954 (R. 23–24).

Petitioner took no further part in the Channel 11 proceeding. Unlike the other applicants, petitioner did not submit any evidence or proposed findings to the Examiner, did not file exceptions to the Examiner's Initial Decision which denied petitioner's application in view of its default, and did not participate in oral argument before the Commission (R. 463). On March 27, 1957, the Commission, in accordance with the recommendation of the Examiner (R. 26–27), granted the application of CBS and denied the other applications, including that of petitioner which it found to have been in default (R. 38, 55). Petitioner did not seek Commission reconsideration or appeal to the Court of Appeals from this final action.

The other losing applicants filed timely court appeals, none of which contested the denial of peti-

tioner's application or raised any issue as to the procedural waiver granted CBS under Section 3.636 of the Commission's Rules. While these appeals were pending, CBS began construction under its permit the effectiveness of which had not been stayed.[1] Thereafter, in September, 1957, CBS changed its plans and contracted to purchase the assets and license of KWK, Inc., an existing station on Channel 4 in St. Louis, and also to assign its Channel 11 construction permit to 220 Television, Inc., one of the losing applicants in the Channel 11 comparative proceeding which the Commission had however found possessed the necessary basic qualifications for a television licensee (R. 6–8, 65–85, 324–352). Both transfers were made subject to Commission approval. On September 26, 1957, the Court of Appeals, at the request of the appellants, dismissed all pending appeals from the Channel 11

[1] Because of problems involving the proposed site, and in view of the subsequent applications for assignment, CBS had not completed construction at the expiration of the time originally provided in the permit. It accordingly sought to modify its permit to extend the time for completing construction and, after the permit was assigned to 220 Television, the modification application was prosecuted in the name of the new permittee. The petitioner objected to any grant of this application, but the Commission, finding that the grant was in the public interest and that in any event petitioner lacked standing to challenge it, approved the modification on September 3, 1958. A petition for reconsideration raising questions as to the regularity of the Commission's proceedings on the original application (the same matters discussed at pages 28-31 of the present petition) has been filed by the petitioner and is pending before the Commission. In addition, the petitioner has subsequently filed a petition for revocation of the construction permit on the same grounds.

grant [2] and on the same date applications for approval of the foregoing assignment contracts were filed with the Commission (R. 454). The Commission gave public notice of the proposed transfers but no opposition to their grant was filed by petitioner or any party. They were subsequently approved by the Commission without hearing on October 23, 1957 (R. 424, 428–429).

On October 30, 1957, petitioner filed a "Protest and Petition", under Sections 309 (c) and 405 of the Communications Act, seeking to have the Channel 11 permit returned to the Commission and a new permittee selected (R. 430–436). In its Memorandum Opinion and Order of December 2, 1957, dismissing this pleading, the Commission pointed out that petitioner's "status is that of an 'ex-applicant' for Channel 11 who, after being declared in default by the Examiner, never appealed this determination, or took any further action by way of proposed findings, exceptions, oral argument, petition for rehearing, or appeal to protect or advance its lost interest in Channel 11" (R. 460–463). Noting further that the Channel 11 grant to CBS had become final and non-appealable, the Commission concluded that petitioner lacked

[2] The assignment contract between CBS and 220 Television provided that 220 Television would effect dismissal of all court appeals from the Channel 11 grant. Another agreement between 220 Television and the other losing applicants who had appealed, St. Louis Telecast and Broadcast House, provided for dismissal of the appeals and for St. Louis Telecast and Broadcast House each to receive $200,000 in debentures issued by 220 Television to reimburse them for the costs of prosecuting their applications.

standing to protest the transfer as a "party in interest" under Section 309 (c) or to petition for reconsideration as a person "aggrieved or whose interests are adversely affected" under Section 405 (R. 463).

Notwithstanding its finding as to standing, the Commission reviewed petitioner's principal allegations with respect to the merits of the assignments and determined that there was no showing that Commission approval of the assignments was improper or contrary to the public interest (R. 463–465). In this connection, the Commission stated briefly that it had found both CBS and 220 Television to be qualified as St. Louis television licensees in the Channel 11 proceeding and had reaffirmed this finding in approving the assignment applications (R. 464). The Commission further noted that under Section 310 (b) of the Communications Act it had no power to give petitioner or any one else consideration as an alternative assignee, but was limited to consideration of whether the proposed assignment to 220 Television would serve the public interest (R. 464).

The court below held (Pet. App. 1a–5a) that petitioner had no standing to protest before the Commission, and therefore no standing before the court, and accordingly dismissed the appeal. By way of dictum, the Court discussed the Commission's construction of Section 310 (b) of the Act (Pet. App. 4a).

ARGUMENT

The only issue properly raised by the petition is the holding of the court below that petitioner lacked standing to challenge the instant assignments before

the Commission.[3] Contrary to petitioner's suggestion (Pet. 10–11), neither the Commission nor the court below passed on the merits of its protest. While the Commission, on its own motion and pursuant to its obligation to protect the public, considered some of petitioner's allegations (R. 463–465), it did not deny the protest on the merits, an action which could only be taken after full oral argument under Section 309 (c) of the Communications Act. Similarly, the court below—although suggesting that the Commission's interpretation of the 1952 amendment to Section 310 (b) governing transfers, if correct, might reflect a serious gap in the statutory scheme warranting Congressional attention—refrained from interpreting that section, or passing upon the sufficiency of the protest, or the validity of the Commission's action in approving the assignments (Pet. App. 3a–5a).

Consequently, if the holding as to standing is erroneous, the Commission would be required to determine the sufficiency of petitioner's protest on the merits in accordance with the procedure prescribed by Section 309 (c) of the Communications Act and the court of appeals would be the appropriate forum for review in

[3] The interests which confer standing to appeal under Section 402 (b) (6) of the Act are identical to those which confer standing to protest Commission action under Section 309 (c) or to petition for reconsideration under Section 405. *Camden Radio, Inc.* v. *Federal Communications Commission*, 220 F. 2d 191, 194 (C. A. D. C.); *Metropolitan Television Co.* v. *United States*, 221 F. 2d 879, 880 (C. A. D. C.); and see S. Rep. No. 44, 82d Cong., 1st Sess., p. 8.

the first instance. There is accordingly no occasion here for this Court to consider petitioner's arguments with respect to either the merits of the assignments (Pet. 11–12) or the validity of the original Channel 11 grant to CBS (Pet. 28–31).

Petitioner's claim (Pet. 22–27) of standing to challenge Commission approval of the assignments, as a "party in interest" under Section 309 (c) of the Communications Act or as a "person aggrieved or whose interests are adversely affected thereby" under Section 405, is entirely without basis. The circumstance that petitioner had once been an applicant for the Channel 11 permit granted to CBS did not make it a party in interest to a subsequent assignment of the permit by CBS after that award had become final and non-reviewable. Moreover, petitioner had previously lost all interest as an applicant for the channel by failing to prosecute its application or exhaust any of the available administrative remedies and by failing to appeal from the denial of its application and the award to CBS. It was thus in the same position as any other would-be applicant for a construction permit and cannot claim any adverse effect attributable to the Commission's action. Cf. *Simmons* v. *Federal Communications Commission*, 145 F. 2d 578 (C. A. D. C.); *Mansfield Journal Co.* v. *Federal Communications Commission*, 173 F. 2d 646 (C. A. D. C.). The court below was therefore correct in holding (Pet. App. 3a) that petitioner had no standing before the Commission or on appeal.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari raises no issue warranting review by this Court and should be denied.

Respectfully submitted,

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